

SERVICE DATE — JULY 12, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 337 (Sub-No. 8X)

DAKOTA, MINNESOTA & EASTERN RAILROAD—ABANDONMENT EXEMPTION—IN
OLMSTED COUNTY, MINNESOTA

Digest:¹ This decision allows Dakota, Minnesota & Eastern Railroad to end its common carrier obligation to provide freight rail service over a 2.01-mile rail line in Olmsted County, Minn., subject to standard employee protective conditions.

Decided: July 10, 2017

By petition filed on March 28, 2017, Dakota, Minnesota & Eastern Railroad Corporation (DM&E) d/b/a Canadian Pacific seeks an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10903 to abandon a 2.01-mile rail line extending from milepost 37.9 +/- of DM&E's Waseca Subdivision, near Eyota, Minn., to the end of the rail line at or near County Road 9, in Olmsted County, Minn. (the Line). DM&E also seeks an exemption from the offer of financial assistance (OFA) procedures of 49 U.S.C. § 10904 and the public use provisions of 49 U.S.C. § 10905. Notice of the exemption was served and published in the Federal Register on April 17, 2017 (82 Fed. Reg. 18,205).

No comments in opposition to the proposed abandonment were filed. The Board will grant the exemption from 49 U.S.C. § 10903, subject to standard employee protective conditions. However, the Board will deny DM&E's request for exemption from the OFA process and deny as moot DM&E's request for an exemption from 49 U.S.C. § 10905.

BACKGROUND

According to DM&E, it is seeking abandonment of the Line because Kruegel Gas Service (KGS), the sole remaining shipper on the Line, has determined that it no longer requires DM&E to provide common carrier rail service directly to the facility. (See Pet. 1; see also KGS Support Statement.) After abandoning the Line, DM&E states that it will retain the Line's connection with the Waseca Subdivision, reclassify an approximately half-mile segment of the Line as excepted industry track, and transfer that segment to KGS, which will use it for shipping,

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

receiving, and storing railcars. DM&E further states that it has executed a purchase and sale agreement to transfer the remainder of the Line, an approximately 1.5-mile segment, upon receipt of abandonment authority, to the Parks & Trails Council of Minnesota (Trails Council) for use as a recreational trail.

According to DM&E, there has been no overhead traffic on the Line since before 1997 when DM&E abandoned a 13.03-mile segment of the Plainview Branch. See Dakota, Minn. & E. R.R.—Aban. Exemption—in Wabasha & Olmsted Ctys, Minn., AB 337 (Sub-No. 5X) (STB served Dec. 16, 1996). DM&E states that there has been no local traffic on the Line for more than two years, other than the traffic received and tendered by KGS. DM&E also states that there are no stations on the Line. The Line does not contain federally granted rights-of-way according to DM&E.

DISCUSSION AND CONCLUSIONS

Exemption from 49 U.S.C. § 10903. Under 49 U.S.C. § 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Here, detailed scrutiny of the proposed abandonment under 49 U.S.C. § 10903 is not necessary to carry out the RTP. DM&E states there has been no local traffic on the Line for more than two years, other than the traffic received and tendered by KGS. By minimizing the administrative expense of the application process, an exemption would expedite regulatory decisions and reduce regulatory barriers to exit. 49 U.S.C. §§ 10101(2) and (7). Additionally, the abandonment would not deprive any shipper of rail service because the only active portion of the Line will be reclassified as exempt industry track and used by KGS, the sole shipper on the Line, to receive and store railcars. Granting DM&E's petition would therefore foster sound economic conditions and would encourage efficient management. 49 U.S.C. §§ 10101(5) & (9). Other aspects of the RTP would not be adversely affected by the use of the exemption process.

The Board also finds that regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power.² As discussed earlier, no traffic has moved over the Line in more than two years other than the KGS traffic. KGS, the only remaining customer on the Line, will use a portion of the Line, after abandonment, as private industry track for receiving and storing railcars, and will continue to receive rail service from DM&E via the industry track's connection to the Waseca Subdivision.

² Because the Board finds that regulation of the proposed abandonment is not necessary to protect shippers from the abuse of market power, the Board need not determine whether the proposed abandonment is limited in scope.

Exemption from 49 U.S.C. § 10904. Under 49 U.S.C. § 10904, a financially responsible person may offer to purchase, or subsidize continued rail operation over, a rail line sought to be abandoned. The Board has granted exemptions from the OFA provisions of 49 U.S.C. § 10904 when the record shows that the right-of-way is needed for a valid public purpose and there is no overriding public need for continued freight rail service. See, e.g., Union Pac. R.R.—Aban. Exemption—in Adams, Weld, & Boulder Ctys., Colo., AB 33 (Sub-No. 307X), slip op. at 2-3 (STB served Oct. 18, 2012).

DM&E has requested an exemption from the Board’s OFA provisions. DM&E argues that, under Board precedent, an exemption is appropriate where, as here, there has been no need or desire for common carrier rail service in many years,³ there is no overhead traffic, and the abandonment of the common carrier obligation would facilitate private use of the track by the lone remaining customer, KGS. (See Pet. 6.) Furthermore, DM&E argues that allowing the abandonment exemption to become effective without first being subject to the OFA provisions, would minimize the need for federal regulatory control over the rail transportation system, expedite the regulatory action, and reduce regulatory barriers to exit, consistent with the RTP in §§ 10101(2) and (7). (See Pet. 7.) Lastly, DM&E argues that it has demonstrated that regulation of the proposed abandonment is not necessary to protect shippers from an abuse of market power. (Id.)

DM&E has not justified an exemption from the OFA process, as it has not demonstrated that the right-of-way is needed for a valid public purpose. While DM&E’s arguments support the petition for exemption to abandon the line, they are not reasonable bases for departing from the statutory objective of providing an opportunity for preserving common carrier rail service as part of the abandonment process. Union Pac. R.R.—Aban. Exemption—in Pottawattamie Cty., Iowa, AB 33 (Sub-No. 300X), slip op. at 4 (STB served Jan. 20, 2012) (denying exemption from the OFA process because private use of a line is not a valid public purpose). In the past, the Board has exempted a proposed abandonment from the OFA procedures to facilitate private rail operations. (See CSX Transp., Inc.—Aban. Exemption—in Genesee Cty., Mich., AB 55 (Sub-No. 633X), slip op. at 3 (STB served July 25, 2007) & The Cincinnati, New Orleans and Tex. Pac. Ry.—Aban. Exemption—in Cumberland & Roane Ctys., Tenn., AB 290 (Sub-No. 208X) (STB served Nov. 15, 2000).) More recently, however, the Board has denied such requests, determining that private use is not a valid public purpose and acknowledging 49 U.S.C. § 10904’s “objective of providing an opportunity for maintaining common carrier rail service as part of the abandonment process.” Union Pac. R.R., AB 33 (Sub-No. 300X), slip op. at 4; see also CSX Transp.—Aban. Exemption—in Chesterfield & Darlington Ctys., S.C., AB 55 (Sub-No. 703X), slip op. at 3 (STB served Jan. 19, 2011) (denying requested exemption from the OFA process to facilitate sale of a line to the shipper for its private use). Accordingly, the Board will deny DM&E’s request for an exemption from the OFA process. Nevertheless, given the

³ DM&E has also stated that there has been no local traffic on the Line for more than two years other than that received and tendered by KGS. (See Pet. 2.)

apparent lack of need for the Line by any shipper other than KGS, any person seeking to file an OFA must provide evidence that there is some shipper (other than KGS) in need of common carrier service. See, e.g., HC R.R.—Aban. Exemption—in Rush, Cty., Ind., AB 1250 (Sub-No. 1X), slip op. at 3 (STB served June 19, 2016) (citing Union Pac. R.R., AB 33 (Sub-No. 300X), slip op. at 4).

Exemption from 49 U.S.C. § 10905. DM&E also seeks exemption from the public use provisions of 49 U.S.C. § 10905. Because requests for a public use condition were due by May 8, 2017, and no request was received, DM&E's request for exemption from § 10905 will be denied as moot.

Employee Protection. Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the Board will impose on DM&E the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho (Oregon Short Line), 360 I.C.C. 91 (1979).

Environmental and Historic Review. DM&E has submitted a combined environmental and historic report with its petition and has notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. §§ 1105.7, 1105.8, & 1105.11. The Board's Office of Environmental Analysis (OEA) has reviewed the report, investigated the environmental record, and analyzed the probable effects of the proposed action on the quality of the human environment.

In an Environmental Assessment (EA) issued on May 26, 2017, OEA concluded that, as proposed, the abandonment of the Line would not significantly affect the quality of the human environment. OEA, however, recommended that one historic preservation condition be imposed on any decision granting abandonment authority, based on an April 17, 2015 letter from the Minnesota State Historic Preservation Office (Minnesota SHPO). In the letter, the Minnesota SHPO stated that it would participate in consultation upon initiation by the Board of the Section 106 regulations of the National Historic Preservation Act, 54 U.S.C. § 306108.⁴ As stated in the EA, the proposed historic preservation condition would require that: (1) DM&E retain an interest in and takes no steps to alter the historic integrity of all historic properties including sites, buildings, structures, and objects within the right-of-way of the Line (the Area of Potential Effect) that are eligible for listing or listed in the National Register of Historic Places until the Section 106 process of the National Historic Preservation Act, 16 U.S.C. § 470f, has been completed; (2) DM&E shall report back to OEA regarding any direct consultations with the

⁴ The Minnesota SHPO's letter was included as part of DM&E's historic report, pursuant to 49 C.F.R. § 1105.8(c).

SHPO and the public; and (3) DM&E may not file its consummation notice until the Section 106 process has been completed and the Board has removed this condition.

OEA provided a copy of the EA to the SHPO for comment. Additionally, pursuant to 36 C.F.R. § 800.2, OEA conducted a search of the Native American Consultation Database and the U.S. Department of Housing and Urban Development's Tribal Directory Assessment Tool to identify federally-recognized tribes that may have ancestral connections to the area. The database identified 12 tribes as having a possible interest in the project area. OEA also provided a copy of the EA to the tribes for comment.

Comments on the EA were due by June 26, 2017, and two comments were filed. First, in a June 15, 2017 email to OEA, DM&E outside counsel submitted a letter from the Minnesota SHPO. The Minnesota SHPO's letter (dated April 7, 2017) states that no historic properties would be affected by the proposed abandonment. Second, in a June 2, 2017 letter to OEA, the Tribal Historic Preservation Officer (THPO) for the Cheyenne and Arapaho Tribes of Oklahoma states that no Tribal properties would be affected by the proposed abandonment. However, the THPO states that if inadvertent discoveries are made during project implementation that reflect evidence of human remains; ceremonial or cultural objects; or historical sites such as stone rings, burial mounds, village or battlefield artifacts; the THPO should be contacted within 72 hours of the discovery.⁵

In its Final EA, issued June 29, 2017, OEA states that, pursuant to the Section 106 regulations of the National Historic Preservation Act at 36 C.F.R. § 800.4(d)(1), and following consultation with the Minnesota SHPO and the public, OEA has determined that the proposed abandonment would not affect historic properties listed in or eligible for inclusion in the National Register. The documentation for OEA's finding consists of the railroad's historic report, all relevant correspondence, the EA and the Final EA, which have been provided to the Minnesota SHPO and made available to the public through posting on the Board's website at www.stb.gov. Based on OEA's determination, OEA no longer recommends the Section 106 condition as necessary. The Board agrees with OEA's analysis and recommendations and, therefore, will not impose the historic preservation condition.

This action will not significantly impact the quality of the human environment or the conservation of energy resources.

⁵ OEA notes that salvaging activities, including soil and ground disturbance would not occur under the proposed abandonment according to DM&E.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts from the prior approval requirements of 49 U.S.C. § 10903 the abandonment by DM&E of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line.

2. DM&E's request for exemption from the provisions of 49 U.S.C. § 10904 is denied. Any OFA under 49 C.F.R. § 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by July 24, 2017, subject to time extensions authorized under 49 C.F.R. § 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. § 10904 and 49 C.F.R. § 1152.27(c)(1).⁶ Each OFA must be accompanied by the filing fee of \$1,700. See 49 C.F.R. § 1002.2(f)(25).

3. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in boldface on the lower left-hand corner of the envelope: **"Office of Proceedings, AB-OFA."**

4. Provided no OFA has been received, this exemption will be effective August 11, 2017.

5. DM&E's request for exemption from the provisions of 49 U.S.C. § 10905 is denied as moot.

6. Petitions to stay must be filed by July 27, 2017. Petitions to reopen must be filed by July 27, 2017.

7. Pursuant to 49 C.F.R. § 1152.29(e)(2), DM&E shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by DM&E's filing of a notice of consummation by July 12, 2018, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the one-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Board Members Begeman, Elliott, and Miller.

⁶ Consistent with our precedent, and given the apparent lack of need for the Line by any shipper other than KGS, any person seeking to file an OFA must provide evidence that there is some shipper (other than KGS) that would make use of common carrier service. See, e.g., HC R.R., AB 1250 (Sub-No. 1X), slip op. at 3; CSX Transp.—Aban. Exemption—in Wash. Cty., Md., AB 55 (Sub-No. 727X), slip op. at 4 n.8 (STB served Oct. 24, 2013); Union Pac. R.R., AB 33 (Sub-No. 300X) slip op. at 4; CSX Transp., AB 55 (Sub-No. 703X), slip op. at 3.